*Floss v. Ryan's Family Steak Houses, Inc.**

I. INTRODUCTION

Mandatory arbitration agreements are becoming popular in many types of long-term contractual relationships, including employment relationships. The issue in this case is whether an arbitration agreement that provides for arbitration of all employment–related disputes, including federal statutory claims, can be valid and enforceable. In holding that such claims are generally subject to mandatory arbitration agreements, the United States Court of Appeals for the Sixth Circuit joined several other circuits in applying the United States Supreme Court's holding of *Gilmer v. Interstate/Johnson Lane Corporation.*[1] However, the Sixth Circuit made clear that such a holding does not require a finding that a particular arbitration agreement is enforceable, since each agreement must still be evaluated under state contract law.[2]

II. FACTS, PROCEDURAL HISTORY, AND HOLDINGS

Kyle Daniels and Sharon Floss were employees of Ryan's Family Steak Houses, Inc.[3] As a condition of employment, both Daniels and Floss were required to sign an arbitration agreement which would govern all employment–related disputes.[4]

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* 211 F.3d 306 (6th Cir. 2000).

[1] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The First, Second, Third, Tenth, and Eleventh Circuits have all applied *Gilmer* to questions of whether certain statutory claims could be arbitrated under mandatory arbitration agreements. *E.g.*, Johnson v. W. Suburban Bank, 225 F.3d 366 (3d Cir. 2000) (enforcing arbitration agreement for Truth in Lending Act and Electronic Funds Transfer Act claims); Williams v. Imhoff, 203 F.3d 758 (10th Cir. 2000) (enforcing arbitration agreement for ERISA claims); Desiderio v. NASD, 191 F.3d 198 (2d Cir. 1999) (enforcing arbitration agreement for Title VII claims); Randolph v. Green Tree Fin. Corp., 178 F.3d 1149 (11th Cir. 1999) (holding that Truth in Lending Act and Equal Credit Opportunity Act claims are generally subject to arbitration); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999) (holding that ADEA and Title VII claims are generally subject to arbitration).

[2] *Floss*, 211 F.3d at 314. The court cites specifically to the Federal Arbitration Act, 9 U.S.C. § 2 (1994): "The Federal Arbitration Act declares that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon grounds that exist at law or in equity for the revocation of any contract.'" *Id.*

[3] *Id.* at 310.

[4] *Id.* at 309–10. The arbitration agreement is between the employee and a third-party arbitration services provider, Employment Dispute Services, Inc. ("EDSI"). *Id.* at 309.

On August 13, 1997, Daniels was terminated from Ryan's after taking a medical leave. Daniels filed a claim in the United States District Court for the Eastern District of Tennessee under the Americans with Disabilities Act (ADA),[5] "alleging that Ryan's terminated him on account of his handicapped status despite his ability to perform the essential functions of his job with or without reasonable accommodation."[6]

Floss left her position at Ryan's on January 23, 1998, as a result of harassment and intimidation by two of her managers in retaliation for Floss's complaints to the United States Department of Labor regarding the pay practices of Ryan's.[7] On February 17, 1998, Floss filed suit against Ryan's in the United States District Court for the Eastern District of Kentucky, individually and on behalf of similarly-situated employees, for violation of the Fair Labor Standards Act.[8] She alleged that Ryan's did not "pay employees the legally-required minimum and overtime wages," that Ryan's "failed to pay employees for certain hours worked," and that Ryan's "retaliated against her because she complained of these practices to the United States Department of Labor."[9]

In both actions, Ryan's filed motions to compel arbitration under the arbitration agreement both employees had signed with EDSI.[10] The district court hearing Daniels' action ruled that the agreement was not enforceable because there was no consideration, the agreement did not bind EDSI, and the agreement was not clear enough to represent a knowing and intelligent waiver of Daniels' right to pursue his ADA claim in court.[11] However, the district court hearing Floss's case enforced the agreement under the Federal Arbitration Act[12] and rejected Floss's argument that "claims under FLSA could not be made subject to mandatory arbitration."[13] Ryan's appealed the

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The agreement states that Ryan's is a third-party beneficiary of the arbitration agreement. *Id.* at 310. EDSI is given "complete discretion over [the] arbitration rules and procedures," and EDSI may modify those rules at any time, without the employee's consent. *Id.*

[5] 42 U.S.C. §§ 12101–12213 (1994 & Supp. IV 1998).

[6] 211 F.3d at 310.

[7] *Id.*

[8] 29 U.S.C. §§ 201–219 (1994 & Supp. IV 1998).

[9] 211 F.3d at 310.

[10] *Id.*

[11] *Id.* at 310–11.

[12] 9 U.S.C. §§ 2–4 (1994) (authorizing a federal district court to stay any proceeding and compel arbitration if a matter therein is subject to an arbitration agreement and a party has filed suit in contravention of that arbitration agreement).

[13] 211 F.3d at 311 & n.5.

holding of the Tennessee district court, and Floss appealed the holding of the Kentucky district court.[14]

Reviewing both cases de novo,[15] the Sixth Circuit held that neither Daniels nor Floss validly waived their right to bring an action in federal court.[16] The court held that Floss and Daniels were not "contractually obligated to submit their federal claims to arbitration in EDSI's arbitral forum."[17] Specifically, the court found EDSI's promise to provide an arbitral forum to be "fatally indefinite" and provided insufficient consideration for the arbitration agreement, since EDSI had reserved the right to alter the applicable rules and procedures without notification to, or consent from, Ryan's employees.[18]

In dicta, the court also noted that the specific arbitration forum provided by EDSI might be unsuitable for the resolution of statutory claims.[19] First, the court noted that the forum might not be neutral, since EDSI determined the "pool of potential arbitrators."[20] Second, the fee structure was also unfair, since it required an employee to pay one-half the arbitrators' fees as a condition of arbitration.[21]

However, the court was careful to make clear that an employer could enter into arbitration agreements with its employees that encompassed federal statutory claims, provided the arbitration agreement has sufficient consideration.[22]

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[14] *Id.* at 311.

[15] *Id.*

[16] *Id.* at 316.

[17] *Id.* at 314.

[18] *Id.* at 315–16. "Though obligated to provide some type of arbitral forum, EDSI has unfettered discretion in choosing the nature of that forum . . . . EDSI's right to choose the nature of its performance renders its promise illusory." *Id.*

[19] *Id.* at 314.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 316 ("An employer may enter an agreement with employees requiring the arbitration of all employment disputes, including those involving federal statutory claims. Yet an employer cannot seek to do so in such a way that leaves employees with no consideration for their promise to submit their disputes to arbitration.").

III. DISCUSSION

A. Gilmer: *A Judicial Embrace of Arbitration Agreements for Statutory Claims*

In 1991, the Supreme Court addressed the issue of whether claims brought under the Age Discrimination in Employment Act of 1967 (ADEA)[23] were subject to a mandatory arbitration agreement in an employment dispute.[24] Finding the Federal Arbitration Act (FAA)[25] applicable, the Court held that statutory claims, such as those under ADEA, could be subject to mandatory arbitration agreements.[26] The Court held that such arbitration agreements should be enforced unless "'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'"[27] The intentions of Congress may be found in the text of the statute, the statute's legislative history, or in an "inherent conflict" between arbitration and the statute's underlying purposes.[28] The Court noted that even if a statute is found to be subject to arbitration agreements under such an evaluation, the arbitration agreement must still be evaluated for validity under contract law.[29]

B. *The Application of* Gilmer

Although *Gilmer* dealt solely with statutory claims under ADEA, the federal circuit courts have applied *Gilmer*'s holding to find arbitration agreements enforceable for other federal statutory claims,[30] such as those

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[23] 29 U.S.C. §§ 621–34 (1994 & Supp. IV 1998).

[24] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

[25] 9 U.S.C. §§ 1–307 (1994 & Supp. V 1999).

[26] *Gilmer*, 500 U.S. at 26.

[27] *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[28] *Gilmer*, 500 U.S. at 26.

[29] *Id.* at 33. "Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* (quoting FAA, 9 U.S.C. § 2). "'Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract."'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 627).

[30] *See infra* Part III.B.

under Title VII,[31] the Truth in Lending Act (TILA),[32] the Electronic Funds Transfer Act (EFTA),[33] the Equal Credit Opportunity Act (ECOA),[34] Employee Retirement Income Security Act (ERISA),[35] the Americans with Disabilities Act (ADA),[36] and the Fair Labor Standards Act (FLSA).[37]

For example, the Second Circuit recently held that statutory claims under Title VII[38] could be fairly resolved under arbitration and are subject to mandatory arbitration agreements.[39] The Third Circuit came to a similar conclusion in *Johnson v. West Suburban Bank* and compelled arbitration of TILA and EFTA claims, even though arbitration would prevent the plaintiff from bringing a class action suit.[40] The Tenth Circuit also enforced a mandatory arbitration agreement but in the context of claims under ERISA.[41]

The First Circuit held that ADEA and Title VII claims were generally subject to mandatory arbitration agreements but found the specific arbitration agreement at issue to be unenforceable.[42] The Eleventh Circuit also found a particular arbitration agreement to be unenforceable but still concluded that

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[31] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17 (1994 & Supp. IV 1998).

[32] Truth in Lending Act, 15 U.S.C. §§ 1601–1667e (1994 & Supp. IV 1998).

[33] Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r (1994 & Supp. IV 1998).

[34] Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1994 & Supp. IV 1998).

[35] Employee Income Retirement Security Act of 1974, 29 U.S.C. §§ 1001–1461 (1994 & Supp. IV 1998).

[36] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994 & Supp. IV 1998).

[37] Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1994 & Supp. IV 1998).

[38] 42 U.S.C. § 2000e (1994).

[39] Desiderio v. NASD, 191 F.3d 198, 206 (1999). In *Desiderio*, the plaintiff refused to sign an employment contract that included a mandatory arbitration provision and sued under Title VII and constitutional claims. *Id.* at 200. The court affirmed the district court's dismissal of her complaint, holding that Title VII disputes could be fairly resolved in an arbitral forum. *Id.* at 206.

[40] *Johnson*, 225 F.3d at 378–79. The court concluded that the right to bring a class action suit was not found within TILA itself, but that it was instead merely a procedural right that need not be protected from arbitration under *Gilmer* and the FAA. *Id.* at 371.

[41] Williams v. Imhoff, 203 F.3d 758 (10th Cir. 2000). The court applied the FAA, which under *Gilmer* is applicable to individual employment agreements, to determine that the ERISA claims in question were subject to the mandatory arbitration agreement. *Id.* at 764.

[42] Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 4 (1st Cir. 1999). The court held that Merrill Lynch had not given the plaintiff sufficient notice that she would be giving up her right to bring statutory claims in a judicial setting. *Id.* at 20–21.

TILA and ECOA claims were generally subject to arbitration.[43] The Sixth Circuit joins these circuits with its holding in *Floss*, described above.[44]

IV. CONCLUSION

With *Floss*, the Sixth Circuit has joined several other circuits in following the Supreme Court's holding in *Gilmer* to find arbitration agreements in the context of federal statutory claims enforceable. This is evidence of acceptance by the lower federal courts of the positive attitude towards arbitration that has been advanced by the Supreme Court[45] and by Congress.[46] It will be important to see whether the other circuits will follow suit.

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[43] Randolph v. Green Tree Financial Corp., 178 F.3d 1149 (11th Cir. 1999). The court ruled that the arbitration agreement failed to ensure that the plaintiff could vindicate her statutory rights, since there was the potential for steep filing fees, steep arbitrators' fees, and other potentially high costs to arbitration under the system imposed by the arbitration agreement. *Id.* at 1158.

[44] *See supra* Part II.

[45] *Gilmer*, 500 U.S. at 26.

[46] Federal Arbitration Act, 9 U.S.C. § 2 (1994).